THE RHODESIAN LAW JOURNAL

Editor: R. H. CHRISTIE, Q.C.

October 1975 1975 *R.L.J.* Vol. 15, Part 2

CONTENTS

DEPARTMENT OF LAW
UNIVERSITY OF RHODESIA

LEGALISING ILLEGALITIES

BY

G. FELTOE, B.A. (Rhodes), LL.B. (Lond.),
Lecturer in Law at the University of Rhodesia

The Indemnity and Compensation Act, No. 45 of 1975, came into effect on 3rd October 1975, its main objects being to indemnify members of the security forces in respect of acts done in good faith for the suppression of terrorism and to enable members of the public to obtain compensation in respect of such acts without waiting for the end of hostilities.

The author shortly surveys the events leading up to the passing of the Act, the relevant provisions of the common law and the legislation itself. He then puts forward a number of criticisms, especially drawing attention to the undesirability of excluding the jurisdiction of the courts.

EVENTS LEADING UP TO THE ACT

Incursions by African nationalist terrorists into Rhodesia commenced about 1964. Since that time there has been continued terrorist activity at differing levels of intensity. The success of the terrorists has largely been dependent upon winning the support and co-operation of the local African population in the areas in which they have operated. Where co-operation has not been forthcoming, methods of violent intimidation have been resorted to. On the other hand the Rhodesian security forces have also been heavily dependent upon the co-operation of the resident population for the success of their counter-insurgency campaign. No declared state of warfare exists between two sovereign independent states in this conflict. The conflict could almost be categorised as a civil war insofar as many of the African terrorists are Rhodesians who have left the country and have been trained in terrorist tactics outside Rhodesia. Although there has been a continual declared state of emergency in Rhodesia since before 11th November 1965,[1] no proclamation of martial law has been made during this time. It is arguable, however, that the passing of the indemnity legislation is tantamount to a declaration that martial law exists, at least in certain areas of Rhodesia. This question will be considered in more detail later. Prior to the indemnity legislation the escalating terrorist situation had led to the passing of a considerable number of stringent measures, including the proclamation of several curfews over large tracts of land. Throughout, the Rhodesian Government has maintained the attitude that the terrorists were nothing more than common criminals. The campaign to combat terrorism has therefore been treated by Government as essentially a

---

1. In the ten years immediately preceding U.D.I. there were six declarations of states of emergency, each of three months' duration. A new state of emergency has been continually renewed since then, the 1969 Constitution providing for an extension of the period of validity of the state of emergency from three months to one year.

policing operation with the military merely assisting in this police action.

In April 1975 the Catholic Commission for Justice and Peace published a booklet entitled *The Man in the Middle*. *Inter alia* this publication made allegations that there was a body of evidence of torture and assaults and destruction of property by members of the Rhodesian security forces directed against innocent civilians in certain tribal areas of Rhodesia. These acts, it was alleged, were committed with the intention of extracting information about the movement of terrorists or of intimidating the populace to co-operate with the security forces. These allegations, and others of a similar nature, were totally refuted by the Government. The Government rejected the call for an independent enquiry into these allegations, stating that persons alleging to have been injured by such actions had the perfectly adequate remedy of pursuing their grievances in the ordinary courts. In fact categorical statements were made at this time by senior members of Government that the courts would *always* remain open to such persons to air their grievances. In line with these indications a number of civil claims were commenced in the High Court by persons alleging to have been injured in these circumstances. Some months later, however, the Indemnity and Compensation Act was passed by Parliament despite a report by the Senate Legal Committee that it was inconsistent with the Declaration of Rights. Apparently the main reason for this change of approach on the part of the Government was that it was felt that pending court actions were being brought with the intention of undermining, denigrating and demoralising the security forces and if these and other actions were allowed to be brought they would hinder the security forces in the performance of their task, as under threat of litigation they might be reluctant to take action clearly justified by the military situation. Speaking in support of this legislation Advocate Andersen S.C., M.P. contended that the indemnity afforded by the legislation " . . . may well be argued to already exist at the common law."[2] It was further argued that this legislation would allow persons injured by *bona fide* wrongdoing to be compensated immediately, whereas under the common law the courts would lack jurisdiction to award compensation in respect of injuries incurred in time of war.

THE COMMON LAW POSITION

The common law position in England, South Africa and Rhodesia appears to be as follows:

(i) "When a state of war or of insurrection, riot or rebellion amounting to war exists [a Government] may use the amount of force necessary in the circumstances to restore order. This use of force is sometimes termed 'martial law'."[3] A formal proclamation of martial law does not have to be made for martial law to exist.

---

2. *Hansard*, 28th August 1975, p. 1495, col.1.
3. *Halsbury's Laws of England* (4th ed.), vol.8., p.981.

"The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends on the question whether there is war or not."[4] "A proclamation of martial law is merely a notification to all concerned that the right in question is about to be exercised and along certain lines."[5] "It is merely an indication to all civilians, so far as they may have been in any doubt, as to what condition does in fact prevail."[6]

(ii) When "a state of actual war exists the civil courts have no authority to call in question the actions of the military authorities, but it is for the courts to decide, if their jurisdiction is invoked, whether a state of war exists which justifies the application of martial law."[7]

(iii) "The powers, such as they are, of the military authorities cease and those of the civil courts are resumed *ipso facto* with the termination of the state of war, and, in the absence of an Act of Indemnity, the civil courts may inquire into the legality of anything done during the state of war. Even if there is an Act of Indemnity couched in the usual terms, malicious acts will not be permitted."[8]

The courts have sought to justify this common law position on the basis that to open military operations to challenge in the courts while was is raging might hamper such operations very seriously and where the safety of the State is at stake no obstacle should be placed in the path of those seeking to restore order.

There is no clear guidance in the case law as to how extensive or widespread the conditions of war, rebellion or insurrection must be before the stage is reached when the courts would be bound to decline jurisdiction over the actions of the military. In the case of *Ex parte D.F. Marais* [1902] A.C. 109 the court stated:

"Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot, or disturbance neither so serious or so extensive as really to amount to a war at all, has not been treated with excessive severity, and whether the intervention of the military force was necessary . . .".

There is difficulty in the Rhodesian context in describing the nature and extent of the conflict. There is no declared state of warfare between two warring factions. The terrorists are not conducting

---

4. *Tilonko v. A.G. for Natal* [1907] A.C. 93 at 94.
5. *Krohn v. Minister of Defence and Others*, 1915 A.D. 197.
6. Andersen in *Hansard*, 28th August 1975, p. 1493, col. 2.
7. *Halsbury's Laws of England, loc. cit.*
8. *Halsbury's Laws of England, loc. cit.*

a conventional war, but are adopting guerilla style tactics. As the then Minister of Justice and Law and Law and Order has pointed out[9] the terrorist campaign is a continuing thing and no end to it is in sight. The only end from the terrorist standpoint is the overthrow of the white minority Government. The terrorist campaign is localised, although the areas in which their activities are concentrated are very extensive. The intensity of their activities has fluctuated considerably over the years from very little activity to relatively large infiltrations. They have tended to avoid direct confrontation with the security forces, apart from occasional ambushes, and have rather attacked white farm dwellings, laid landmines, etc. They have conducted a campaign of violence against the local African civilian population to force co-operation.

It would seem, however, that it could be argued that an actual state of war has existed in the operational areas in Rhodesia since the commencement of terrorist infiltrations in 1964, or at least since the start of the intensified campaign in 1972. It has been contended that the common law ruling that the courts lack jurisdiction in respect of military activities during an actual war can extend to areas other than where hostilities are actually taking place for the time being.[10] Pollock argues in (1902) 18 *L.Q.R.* at p.156 that

> "The range of the acts must extend to the prevention of aid and comfort to the enemy beyond the bounds of places where warlike operations are in sight. In many places there may actually be peace and yet modern means of communicating may admit of important aid being conveyed to the enemy in the shape of information, supplies and personal adherence."

THE INDEMNITY AND COMPENSATION ACT

This Act applies to proceedings in the courts against the Government or any Government servant or any person acting under the direction or with the approval of the Government, and it applies both to proceedings already pending and those that may be instituted in the future. The Act has retrospective effect and applies to actions done from 1st December, 1972.

The Act provides that no civil or criminal proceedings may be instituted or continued in any court of law against the State, its employees or its appointees in respect of acts done in good faith whilst acting for the purpose of, or in connection with, the suppression of terrorism or maintenance of public order. A written certificate by the Minister that the act was done for the suppression of terrorism is deemed to be conclusive proof in any court of law that the act was done for this purpose. The Minister can issue this certificate acting alone without reference to the President or the Executive Council. Thus no court could question the certificate, even if it could be proved that

---

9. *Hansard*, 28th August 1975, p.1434, col.2.
10. See for instance *Elphinstone v. Bedseechund* (1830) 1 Knapp. P.C.316.

the act in question had nothing whatsoever to do with the suppression of terrorism. The claimant is given no right to state his side of the story before the certificate is issued. There is no definition of the terms "good faith", "terrorism" or "public order".

Civil or criminal proceedings already instituted can be terminated by a slightly different procedure. The President acting on the advice of the Executive Council can authorise the Minister to issue a certificate terminating such proceedings if he decides that the act was done by the State, its employees or appointees in good faith for the purposes of, or in connection with, the suppression of terrorism or the maintenance of public order and that it is in the national interest that such proceedings shall not be continued. The President makes this decision having regard to a full report by the Minister, setting out the circumstances in which the act took place and the factors showing that the conditions set out in the Act were present. Whilst the Minister can make this report there is no provision for any claimant to make any representations to the President or to the Minister to state his side of the story. The Minister has the right to make this report even though the legal proceedings are against himself. The Government alone decides what constitutes "good faith", action necessary to suppress terrorism or in connection with the suppression of terrorism, "public order", and "national interest". The courts are prohibited from questioning the validity of any certificate issued. Review jurisdiction of the courts is expressly excluded. No reasons for the issuing of the certificate need be given.

When proceedings are terminated by the issue of a certificate, the courts are prohibited from ordering the legal costs already incurred by the claimants to be paid by the Government, even if the Government's defence has been made in bad faith or is frivolous or vexatious. But if the claimant has acted frivolously or vexatiously, the court may order him to pay the Government's costs. If the claimant has not been frivolous or vexatious, he must pay his own costs and the Government must pay its own costs.

Criminal prosecutions which have been commenced or those instituted in the future can be terminated by means of the same procedure, even if the prosecution has been instituted by a State Prosecutor or by the Attorney-General. Moreover if the prosecution is terminated, the accused is entitled to be acquitted.

The court itself is bound to terminate any proceedings before it, even if no Ministerial certificate has been issued, if the court is of the opinion that such proceedings should not have been instituted because the injury arose out of *bona fide* action to suppress terrorism or to maintain public order.

Where proceedings were pending on 3rd October 1975 and these are terminated, the Minister is obliged to refer the claim to a Compensation Board. But if the proceedings are instituted after 3rd October 1975 the Minister is under no obligation to refer the claim to the Compensation Board, but may do so in his discretion. Again it should be noted that the Minister will often be the person against whom the claim is

made. Where a person wishes to pursue a claim which has been stopped before the courts, he must write to the Minister setting out fully the grounds on which he is claiming and also the extent of injury or loss suffered.

The five members of the Compensation Board are appointed by the Minister. The chairman of this Board must have certain legal qualifications, but the legal chairman could be outvoted by the other members. It may award compensation to any person who has suffered loss or injury for which he would have a claim but for the operation of the Act. However, the Board is not bound to award compensation. In its inquiry it can take into account "such factors as it thinks fit". Thus it is conceivable that it could decide that the claimant was not deserving of compensation at all for proven injuries because, for instance, there is some evidence that he was a sympathiser with the terrorists or had not rendered maximum co-operation to the authorities. An interesting question arises as to what the Board would do if it formulated a different opinion on the evidence of the nature of the action causing the injury as compared with the Minister's. What would happen if it decided that the action was not *bona fide* or was not to suppress terrorism or to maintain public order? Presumably it would have to decline to award compensation as it would lack jurisdiction in such circumstances. On the other hand the claimant would be precluded from approaching the ordinary courts.

As regards the procedures of the Board the rules of evidence do not apply to its proceedings. The claimant has no right to argue his case before the Board or attend its hearings. The board may choose to sit in secret. The Board is not required to give any reasons for its decision to the claimant or to the public or to anybody, except the Minister. Again this is the Minister who in many cases is the defendant in the action. The only appeal against the finding of the Board is to the Minister, but the claimant is not permitted to know the reasons of the Board for the decision. This makes it difficult to set out in writing the full reasons for the request for reconsideration by the Minister, as required by the Act. The appeal is being made blindly as it were.

Any payment of compensation awarded by the Board can be suspended whilst the person to whom the payment is made is imprisoned or detained, but the Board can, if it thinks fit, pay this money to dependants during this time.

When this legislation was introduced in Parliament Advocate Andersen, S.C., M.P., argued that the legislation was desirable for the avoidance of doubt, but the indemnity which it would afford could well already exist under the common law. In order for the common law position to pertain a state of actual war had to be occurring. That a state of warfare did exist in the operational areas was admitted by the Government in this debate.[11] It could thus be argued that the passing of this

---

11. Prior to this the Government seemed to want to play down the warfare nature of the situation. For instance Senator Lardner-

legislation amounted to a disguised proclamation of martial law.

A number of difficulties arise with the application of this legislation. First and foremost it would seem that if the common law position is such that at the present time the ordinary courts lack jurisdiction to deal with cases of *bona fide* wrongdoing arising out of military operations, the same would apply to *mala fide* wrongdoing. Until the cessation of hostilities the courts would not have jurisdiction to deal with any of the actions of the military either *bona fide* or *mala fide*. This would mean that the person who is injured by *mala fide* wrongdoing might find himself without a remedy as a result of the indemnity legislation. The Government has said that the legislation differentiates between *mala fide* and *bona fide* action and those injured by *mala fide* action can still pursue their claims before the ordinary courts. But if they did pursue their claims in this fashion they might be met with the reply that the courts lack jurisdiction because war is waging. Additionally they could not apply to the Compensation Board because it falls outside their terms of reference to award damages for *mala fide* injury. Conceivably it could be argued that this legislation in fact granted to the courts jurisdiction where under the common law they had none. The legislation does not state this, however.

Secondly in future anybody who has a claim of any kind against the Government for any wrongdoing will be uncertain as to whether to bring his claim in the courts or to apply to the Minister for compensation. If he applies to the Minister for compensation, the Compensation Board may turn down the application without giving any reasons. The claimant will not know whether this was because it was a claim he should have brought in the courts because the actions which caused him injury were not done in good faith or whether there was some other reason. If the claimant institutes proceedings in court, these may be terminated by a certificate and the claimant may be completely ignorant that the actions he complains of were done in good faith. The claimant may well not know of the special facts known to the Government, nor is the Government under any duty to tell him. If the Minister is mistaken or misled by some lie and issues a certificate, there is no way the matter can be investigated by the courts and there is no way the claimant could know of the fact.

Thirdly, and perhaps the most trenchant criticism, nowhere in the legislation are the key terms "in good faith", "for the purposes of or in connection with the suppression of terrorism or maintenance of public order" and "in the national interest" defined. The Act lays down no indication of the limits of the unlawful violence that may be perpetrated upon innocent people. The executive decides in its own discretion

---

Burke speaking in the House in September 1974 resisted suggestions that captured terrorists should be summarily executed in the field after being tried by kangaroo courts. He said that to allow this would be to imply that the civil powers had lost control of the situation and that a state of martial law was in effect.

whether the tests laid down in the Act are satisfied. Particularly disturbing is the incorporation of indemnity for acts committed for the maintenance of public order. This criterion goes far beyond anything to do with terrorism and is very dangerously wide and was not debated or explained when the Act was introduced into the House. At no stage has the Government stated publicly what its policy will be in the present circumstances regarding the definition of the limits of unlawful violence upon innocent people. The jurisdiction of the courts to decide upon the limits is excluded, as is their jurisdiction to ensure that the tests are properly applied. It is of course well nigh impossible to give an accurate and comprehensive definition of these terms covering all anticipated military situations. It should be observed, however, that acts of atrocity and extreme brutality can be committed in perfectly good faith to suppress terrorism. For instance, a policeman could commit acts of sadistic torture upon a prisoner and could be acting in good faith in order to extract what that policeman believes to be vital security information. The point is not so much that the legislation should have sought to define these terms in an objective manner, but rather that it is disquieting that the interpretation and application of these provisions should have been left to the executive and not an independent tribunal. The executive is intimately involved in the anti-insurgency campaign and must have a strong leaning in favour of vindicating the actions of the security forces. In effect the executive is a judge in its own cause and this contravenes the time-honoured principle entrenched in Western civilization, namely, *nemo judex in sua causa*. The contrast between the present legislation and other examples of indemnity legislation is that almost without exception other Acts of Indemnity have been passed *ex post facto*, that is, after the end of the war. Also almost invariably other Acts of Indemnity have not covered malicious acts. It has thus been left to the courts to decide what action was perpetrated *bona fide* and what action was *mala fide*.[12]

All this leads up to the question as to whether the administration of this legislation should not have been left in the hands of the courts. Accepting for the moment that the legislation was desirable in so far as terrorist activity has occurred over a protracted period of time and no end to the warfare is in sight and thus that compensation awards could not be left in abeyance for an indefinite period, was it not possible for the legislature when formulating this Act to incorporate judicial processes? In the Rhodesian Parliament it was argued that military acts should not be judged in open court and that in any case civil courts, even if informed as to the facts, would seldom be in a position to determine the necessity or otherwise of a military act.[13] To the first point it can be said that proceedings would not have to be in open court. There are more than ample provisions allowing proceedings to be held *in camera*. As regards the latter point our courts have already had exten-

---

12. See the list of such pieces of legislation referred to by the then Minister of Justice and Law and Order in *Hansard*, 29th August 1975, pp. 1434-5.
13. See *Hansard*, 28th August 1975, p. 1431.

sive experience in dealing with the realities of military situations in terrorist cases. It is inconceivable that they would adopt anything other than a realistic and pragmatic approach in regard to injuries caused to civilians during the conduct of military operations. Even before the advent of this legislation the courts would have dismissed unfounded claims with costs, which would have tended to discourage vexatious litigation. Additionally if, as appears to have been the case, the main purpose of this legislation was to prevent the harassment and denigration of the security forces in court actions, was it not possible to pass criminal provisions to punish severely persons or organizations found to have brought claims not to pursue genuine grievances, but only to undermine the security forces? Prior to the legislation the courts would, it is submitted, have displayed pragmatism in dealing with such civilian claims. Civilians can only be injured in one of three ways - namely, accidentally, negligently or wilfully and maliciously. The first type of injury would not have been actionable (although presumably the Government would have offered *ex gratia* payment of compensation in such cases, as it has done in certain cases recently). The courts would obviously have applied the concept of negligence restrictively taking into account field conditions, the need for urgent action, etc. It would seem that to leave the courts the decision as to whether there was negligence (applied very restrictively) or malice would be preferable to leaving to the executive a very broad and vague discretion to decide whether the action was performed in good faith. The area covered by the courts would be only a little broader than that left to them by the Act, where they would have jurisdiction to deal with matters of *mala fide* wrongdoing. Under the legislation it is feared in certain quarters that the term "in good faith" could be interpreted so widely by the executive as to leave no room for court actions on the basis of *mala fide* wrongdoing. This it is hoped is a completely unfounded fear, but there is absolutely no independent check upon the interpretation of the executive of such matters.

At very least it seems that there is absolutely no valid reason why the High Court could not deal with the question of *quantum* of damages arising out of the application of the Act. At the stage at which a Ministerial certificate is issued the Government is admitting that the acts or omissions causing the injuries did take place but are ruling that they were done in good faith. In the matter of compensation, therefore, all that presumably has to be decided upon is what constitutes a fair award given the nature and extent of the injuries. Under the terms of reference of the Compensation Board, however, there is nothing to indicate in what circumstances or in what amount such compensation might be awarded. Justice should be manifest in the matter of compensation. The claimant should have the right to appear to state his case if he wishes and proceedings should be in public except for evidence of assistance to the terrorists. Such approach is essential for the furtherance of the "hearts and minds" campaign. An independent court should deal with these matters rather than an administrative tribunal selected by the Government.

By way of closing the following should be borne in mind:

"In no respect can martial law be regarded as a good thing; it

> is at best a lamentable necessity. It imposes a great responsibility upon the executive Government; it operates with inevitable harshness in certain cases, and it saps the political fibre of the people." Per Innes C.J. in *Krohn v. The Minister of Defence*, 1915 A.D. 191, 202.

It is suggested that Parliament should thus not be quick to pass indemnity legislation, particularly *during* a state of war. Without it at least there will be a check on extremes of conduct as the military commanders will remain apprehensive of what acts will be condoned later. It is to be hoped that as soon as is possible the full effect of the normal processes of the law will be regained.

"Mr. Interpreter, what is the problem?"
"My Lord, the accused is asking irrelevant questions."
"It is my function to decide whether or not questions are irrelevant. What is the accused saying?"
"The accused wishes to know where your Lordship bought the fine red blanket you are wearing."